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IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. ROBERT RAY LYMAN, Defendant.	**KSTU FOX 13'S OPPOSITION TO MOTION TO EXCLUDE CAMERAS FROM THE COURTROOM** **(Hearing Scheduled – September 30, 2019)** Case No. 181402907 Judge M. James Brady

Pursuant to Rule 4-401.01 of the Utah Rules of Judicial Administration, and through its undersigned counsel, KSTU Fox 13 ("Fox 13") hereby submits this Opposition to the Motion to Exclude Cameras from the Courtroom filed by Defendant Robert Ray Lyman ("Lyman") and requests to be heard at this Court's September 30, 2019 hearing on the Motion.

INTRODUCTION

Rule 4-401.01 establishes a presumption in favor of allowing electronic media access ("EMC") to public court proceedings. The presumption can be overcome only by a non-speculative, specific showing that is sufficiently compelling to outweigh the interests in public

access. The rule furthers the significant benefits public access and participation play in the judicial system and is a recognition that the public's right of access can and does coexist with the fair trial rights of litigants.

This is a case of substantial newsworthiness and public interest. As part of its constitutional function of gathering and disseminating news and information to the public, Fox 13 intends to submit a request for EMC of the trial in this matter. For two reasons, Lyman has not shown good cause to reverse the presumption of EMC and ban cameras from the courtroom during trial.

First, the trial in this case will be open to the public, as it is constitutionally required to be. News reporters will be free to attend the proceedings and to report on them. Whether what transpires in the courtroom is relayed by reporters who attend the trial, or also shown through video and audio taken at the trial, makes no difference in terms of material prejudice to the jury pool. Indeed, video and audio is likely to improve the accuracy of the information conveyed and thus reduce any risk of undue prejudice.

Second, Lyman's cursory assertions of prejudicing the jury pool during trial are insufficient to overcome the presumption favoring EMC of public court proceedings. Aside from the fact that the argument troublingly presumes the empaneled jury will ignore this Court's instructions to avoid media coverage during its service, generalized assertions of potential prejudice are never sufficient to overcome the presumptive right of access, as Rule 4-401.01 expressly provides. There have been many high profile trials in Utah that have coexisted with the right of access without impairing a defendant's right to a fair and impartial jury. The Utah Supreme Court has specifically endorsed a number of less-restrictive alternatives that allow

courts to empanel impartial juries despite widespread news coverage, and some of those tools are specified in the EMC rule itself. These time-tested tools are a far better course of action than sacrificing the public's ability to see what transpires in its courts.

For all of these reasons, this Court should uphold the presumption of EMC for the trial and deny Lyman's motion.

ARGUMENT

I. THE SUBJECT MATTER OF THE TRIAL WILL ALREADY BE PUBLIC.

The public and news media enjoy a presumptive constitutional right of access to criminal proceedings. "[A]t the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569 (1980). "From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice." *Id.* at 573.[1]

This right of access has a time-honored history, rooted in the acknowledgement that the open court fosters and protects important societal values. It enhances the quality and safeguards the integrity of the fact-finding process, *Globe Newspaper Co.*, 457 U.S. at 604, enhances basic

[1] The United States Supreme Court and the Utah Supreme Court have affirmed this right of access in a variety of contexts. *See, e.g.*, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*") (preliminary hearings); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*") (criminal voir dire proceedings); *Waller v. Georgia*, 467 U.S. 39 (1984) (pretrial suppression hearing); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (criminal trial involving child victim of rape); *Soc'y of Prof'l Journalists v. Bullock*, 743 P.2d 1166 (Utah 1987) (competency hearing); *Kearns-Tribune v. Lewis*, 685 P.2d 515 (Utah 1984) (preliminary hearings).

fairness and the appearance of fairness in the proceedings, *Press-Enterprise II*, 478 U.S. at 13, fosters public confidence in the judicial process and acceptance of its results, *Press-Enterprise I*, 464 U.S. at 506, acts as a check on the judiciary, *Richmond Newspapers*, 448 U.S. at 568, and allows the public to participate in government. *Id.* at 587 (Brennan, J., concurring). Although members of the public may not attend criminal proceedings in large numbers, the news media acts as the public's surrogate in attending such proceedings and reporting to the public, thus educating the public. *Id.* at 572.

Conversely, denying public access to judicial proceedings or documents precludes public scrutiny of the judicial process, creating an impression of unfairness and secrecy, even though the proceedings may in fact be imminently fair. *See* M. Fowler & D. Leit, *Media Access to the Courts: The Current Status of the Law* (American Bar Association, Section of Litigation 1995) at 1; *see also Soc'y of Prof'l Journalists v. Sec'y of Labor*, 616 F. Supp. 569, 576 (D. Utah 1985) (Winder, J.) ("Openness safeguards our democratic institutions. Secrecy breeds mistrust and abuse."), *appeal dismissed and remanded on other grounds*, 832 F.2d 1180 (10th Cir. 1987).

While the right to EMC of a public hearing in Utah is rule-based, rather than of constitutional magnitude, it works in tandem with the public's constitutional right of access to better and more accurately inform the public of the conduct of judicial proceedings.

The trial in this case will presumably be open to the public, consistent with this controlling constitutional presumption of access. As a result, members of the public and news media will be present at the trial and entitled to report what happens and what is discussed. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 568 (1976) ("To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated

settled principles: '[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom.'" (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966)).

To overcome the presumption of EMC coverage of this public proceeding, therefore, Lyman would need to identify something about video and audio coverage of the trial that would be uniquely prejudicial, while reporting the very same facts in newspaper articles or conveying them through a reporter in attendance would not. He has not done so. In fact, likely the opposite is true—EMC of the trial will increase accuracy and thus be less likely to cause prejudice. That is why the EMC rule presumptively allows EMC for public hearings. At the very least, there is not a sufficient difference between those types of news coverage to raise any real risk of material prejudice that overcomes the presumption in the rule. As a result, there is no good cause to deny EMC of the public trial.

II. LYMAN'S ASSERTIONS OF JURY PREJUDICE ARE INSUFFICIENT TO OVERCOME THE PRESUMPTION OF EMC.

The presumption under Rule 4-401.01 can only be overcome only if the party objecting to EMC sets forth specific reasons that are so sufficiently compelling as to outweigh the presumption. Utah R. Jud. Admin. Rule 4-401.01(2)(A). Importantly, "[a]ny reasons found sufficient to prohibit or restrict electronic media coverage shall relate to the specific circumstances or the proceeding rather than merely reflect generalized views or preferences" regarding EMC. *Id*. 4-401.01(2)(D). Lyman has not carried that burden here.

Lyman's only argument for why EMC should be prohibited here is the cursory assertion that "media attention in this matter is more prejudicial and pervasive than most cases," and that the jury—supposedly after they have already been empaneled and instructed not to view coverage of the case—"should be protected from that outside influence." (Mot. p. 2.)

Such speculative assertions are insufficient. Every high profile case involves news coverage of litigants and the proceedings, and that coverage typically draws criticism from criminal defendants. If that is all it took to limit the public's ability to observe a proceeding, the presumptive right of access would be meaningless, and, perversely, the greater the public interest in a case, the less the public would learn about the proceedings.

That is not the law. Rather, "[i]t is only upon the showing of some *specific circumstance* that gives rise to significant probability of prejudice to the proceeding that the courts are inclined to close the courtroom and seal the records." *People v. DeBeer*, 774 N.Y.S.2d 314, 315 (N.Y. Cty. Ct. 2004) (emphasis added). *See also* Utah R. Jud. Admin. Rule 4-401.01(2)(D); *In re Times-World Corp.*, 488 S.E.2d 667, 682 (Va. Ct. App. 1997) ("The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial]. The burden [is] on the moving party to show that an open hearing would jeopardize the defendant's right to a fair trial." (citation omitted)); *cf. United States v. U.S. Oncology, Inc.*, No. 7:00-CV-00350, 2005 WL 3334296, at *3 (W.D. Va. Dec. 7, 2005) (finding that defendants had not overcome "the presumption in favor of public access" by providing "general claims of prejudice"); *State v. Cianci*, 496 A.2d 139, 145 (R.I. 1985) (finding that "blanket statement of potential prejudice was not sufficient to demonstrate compelling reasons for ordering the sealing of discovery documents").

Furthermore, Lyman's argument about prejudicing the jury during trial presumes that jurors will violate this Court's instructions and view electronic media coverage during their service. That assertion is contrary to bedrock principles of the jury system and the long

experience of courts empaneling fair and impartial juries in cases far more high-profile that this one. As the Utah Supreme Court explained in a related context:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his [or her] impression or opinion and render a verdict based on the evidence presented in court.

State v. Lafferty, 749 P.2d 1239, 1251 (Utah 1988) (quoting *Murphy v. Florida*, 421 U.S. 794, 800 (1975)); *see also State v. Gardner*, 789 P.2d 273, 277 (Utah 1989) (same); *In re Search Warrant*, 923 F.2d 324, 329 (4th Cir. 1991) ("It verges upon insult to depict all potential jurors as nothing more than malleable and mindless creations of pretrial publicity…. They are [] quite capable of concentrating on the evidence presented before them in open court, especially when admonished by appropriate instructions of their sober responsibility to do so.").

Perhaps even more to the point, all Lyman seeks to do is prevent jurors from seeing what they have *already observed in court*. There will still be news coverage of the trial regardless, and it is hard to see why permitting more accurate EMC of the proceedings, even if jurors disregard their instructions, would cause any meaningful prejudice.

Lyman may be skeptical of the ability of courts to empanel fair juries and the willingness of jurors to discharge their duties with impartiality. But the Utah Supreme Court is not, and it has specifically counseled courts to look to less-restrictive alternatives that accommodate any unique aspects of a case without sacrificing the public's right of access. *See State v. Allgier*, 2011 UT 47, ¶¶ 19-20, 258 P.3d 589. Indeed, some of those less-restrictive alternatives are already built in to Rule 4-401.01, which balances competing interests and provides this Court with a number of ways to tailor or limit EMC in a particular proceeding to address specific

concerns.[2] Lyman's policy disagreement with Utah's presumption of EMC for public trials is not the type of particularized showing that justifies a blanket ban on all EMC of his trial.

CONCLUSION

"People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572. For all of the foregoing reasons, this Court should deny Lyman's motion.

RESPECTFULLY SUBMITTED this 26th day of September 2019.

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[2] For example, the Rule prohibits electronic media coverage of (i) a juror until the person is dismissed, (ii) a person who is a minor, (iii) exhibits or documents not in the official public record, (iv) audio of bench conferences, and (v) audio or confidential communications between counsel and client and between counsel.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of September 2019, a copy of the foregoing **KSTU FOX 13'S OPPOSITION TO MOTION TO EXCLUDE CAMERAS FROM THE COURTROOM** was electronically filed in the above-captioned matter, which served the following. The Opposition was also hand-delivered to chambers.

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